

MINUTES FOR THE BOARD OF ADJUSTMENT MEETING

January 27, 2012

- I. **ATTENDANCE** – Chairman Stout called the meeting to order at 1:00 p.m. in the Council Chambers, 200 East Main Street, on January 27, 2012.

Members in attendance were Chairman Louis Stout, James Griggs, Barry Stumbo, Kathryn Moore, Jan Meyer, Noel White and Thomas Glover. Others present were Chuck Saylor, Division of Engineering; Jim Gallimore, Division of Traffic Engineering; Capt. Charles Bowen, Division of Fire & Emergency Services; and Rochelle Boland, Department of Law. Staff members in attendance were Bill Saltee, Jim Marx, Jimmy Emmons and Wanda Howard.

Swearing of Witnesses – At this time, the Chair asked everyone that intended to speak at today's meeting to stand and be sworn. Many members of the audience did so, and Chairman Stout administered the oath.

- II. **APPROVAL OF MINUTES** – There were no minutes to approve at this time.

III. **PUBLIC HEARING ON ZONING APPEALS**

- A. **Sounding The Agenda** - In order to expedite completion of agenda items, the Chair will sound the agenda in regard to any postponements, withdrawals, and items requiring no discussion.

1. **Postponement or Withdrawal of any Scheduled Business Item** - The Chair will announce that any person having an appeal or other business before the Board may request postponement or withdrawal of such at this time.

- a. **A-2011-76: DAVID BENNETT / LEXINGTON GREEN** - appeals for an administrative review to allow a shopping center identification sign on a stone planter box that will project into the street right-of-way, in a Planned Shopping Center (B-6P) zone, on property located at 161 Lexington Green Circle (Council District 9).

The Staff Recommends: Postponement, for the following reasons:

- a. A determination needs to be made regarding the correct property that this appeal should be filed under. At the minimum, documentation is needed that the appellant has sufficient legal interest in the subject property to pursue the requested sign appeal. Alternatively, it may be necessary to amend the application and re-notice area property owners to include the property known as 3211 Nicholasville Road, which is not owned by the appellant.
- b. There is some uncertainty as to whether or not the prohibition on signage projecting into a right-of-way can be waived by the Board. Further evaluation of this issue in consultation with the Department of Law is necessary.
- c. Additional investigation is needed to determine the most appropriate manner that existing signage on the mall's property can be classified, and how that might relate to the potential for erecting an additional shopping center identification sign.
- d. Depending on how these interrelated issues are resolved, it may be necessary to file a variance request to reduce the required sign setback to 0', which would give the appellant the opportunity to place the sign up to but not beyond the right-of-way boundary.

Representation – The appellant was not present.

Staff Report – Mr. Emmons reported that the staff had received an e-mail from the appellant requesting a one-month postponement of this item.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Glover, and carried unanimously to postpone

A-2011-76: DAVID BENNETT / LEXINGTON to the Board's February meeting.

- b. **A-2011-80: CRESTWOOD CHRISTIAN CHURCH** - appeals for an administrative review to allow four directional signs to be placed on the church property, in a Single Family Residential (R-1C) zone, on property located at 1882 Bellefonte Drive (Council District 4).

The Staff Recommends: Disapproval, and that the decision of the Division of Building Inspection be upheld, for the following reasons:

- a. Under Article 17 of the Zoning Ordinance, directional signs are not a permitted type of sign in the R-1C zone, for any type of use.
- b. The Board is not authorized to increase the number of permitted signs on a particular property, nor permit a design type that is not specifically permitted by Article 17 of the Zoning Ordinance for the zone where the sign is to be located.
- c. The inability to erect directional signage is not considered to be a significant hardship for the church, and many other options are available that might assist them in their efforts to clarify access to and navigation around the church property. Further, they could apply for an amendment to the sign ordinance.

Representation – The appellant was not present.

Staff Report – Mr. Emmons reported that this item had been continued to this meeting from December, and that the staff had been in contact with the appellant. They were requesting a one-month continuance of this item.

Action – A motion was made by Ms. White, seconded by Ms. Meyer, and carried unanimously to continue **A-2011-80: CRESTWOOD CHRISTIAN CHURCH** to the Board's February meeting.

2. **No Discussion Items** - The Chair will ask if there are any other agenda items where no discussion is needed...that is, (a) The staff has recommended approval of the appeal and related plan(s), (b) The appellant concurs with the staff's recommendations. Appellant waives oral presentation, but may submit written evidence for the record, (c) No one present objects to the Board acting on the matter at this time without further discussion. For any such item, the Board will proceed to take action.

- a. **V-2011-82: HALLMARK STUDENT DEVELOPMENT CO., LLC** - appeals for variances to: 1) reduce the required front setback from 20 feet to 5 feet in order to accommodate drive aisles and parking; and 2) reduce the interior landscape area to less than 5% on a single lot, provided the cumulative total for all lots on the development plan is 5% or greater, in a Wholesale and Warehouse Business (B-4) and an Agricultural Urban (A-U) zone, proposed for rezoning to a High Rise Apartment (R-5) zone, on a portion of 1200 Red Mile Road and a portion of 843 South Broadway (Council District 11).

The Staff Recommends: Approval, for the following reasons:

- a. Granting the requested variances will not negatively impact the public health, safety or welfare, nor will it alter the character of the surrounding area. Granting the setback variance to permit additional off-street parking will likely positively impact the public health, safety and welfare, as it will decrease the likelihood of residents and guests parking on adjoining streets such as Curry Avenue, which already has difficulties with on-street parking.
- b. Granting the requested variances will not allow an unreasonable circumvention of the requirements of the Zoning Ordinance. This particular project is controlled by a development plan approved by the Planning Commission, and the proposed parking will be screened and buffered as would any other parking lot for a similar use. Granting the landscape variance will also not have any impact to the subject site, because the proposed four lots will be developed as a single project, which will either meet or exceed the 5% interior landscaped area, overall.
- c. The site is uniquely situated next to a race track and not a residential neighborhood. Since the property will be fenced and landscaped, the parking and drive aisles that are proposed will not be visible along the new road or from the track. Overall, there will be no loss of the required 5% interior landscape area, even though one or more of the individual lots may not meet that requirement when reviewed on its own merit.
- d. Not granting the requested variances will have a negative impact on the amount and design of the parking area as proposed. Without a significant redesign, which will likely result in a loss of residential dwelling units, a major portion of the proposed parking area will be lost.

- e. The requested variances are not the result of the developer's own actions. As originally drafted, the R-5 zone was designed for a single high-rise building on a single lot in a suburban setting. The 5% minimum interior landscaping requirement will be fully met on the overall development; but the inability of the R-5 zone to be approved as a Group Residential Project necessitates the subdivision of this project into four separate lots, which will likely result in one or more of the lots being deficient when reviewed individually.

This recommendation of approval is made subject to the following conditions:

1. The development of the subject property shall take place in accordance with the submitted application and site plan, or as amended by the Planning Commission.
2. All necessary permits shall be obtained from the Divisions of Planning and Building Inspection prior to any demolition or construction activity on the site.
3. Action of the Board shall be noted on the Final Development Plan for the subject property.

Representation – Mr. Bruce Simpson, attorney, was present for the appellant, and requested that the Board act as recommended by the staff. Chairman Stout asked if he understood the recommendation for approval and would agree with the recommended conditions. Mr. Simpson replied in the affirmative.

Action – A motion was made by Mr. Stumbo, seconded by Mr. Griggs and carried unanimously to approve **V-2011-82: HALLMARK STUDENT DEVELOPMENT CO., LLC** – an appeal for variances to: 1) reduce the required front setback from 20 feet to 5 feet in order to accommodate drive aisles and parking; and 2) reduce the interior landscape area to less than 5% on a single lot, provided the cumulative total for all lots on the development plan is 5% or greater, in a Wholesale and Warehouse Business (B-4) and an Agricultural Urban (A-U) zone, proposed for rezoning to a High Rise Apartment (R-5) zone, on a portion of 1200 Red Mile Road and a portion of 843 South Broadway, for the reasons and conditions as set forth by the staff.

- b. **A-2012-1: QUALITY PLUS HOMES** - appeals for an administrative review to allow a second kitchen in a single family residence in a Planned Neighborhood Residential (R-3) zone, on property located at 2421 Rossini Place (Council District 6).

The Staff Recommended: Approval, for the following reasons:

- a. Article 1-11 defines "kitchen facilities" and "family or housekeeping unit" which are designed to work together in defining a dwelling unit, so that the presence of multiple kitchen facilities would indicate a desire for multiple dwelling units. In this case, the floor plans of the structure do not indicate, nor are they conducive to, the use of this proposed accessory kitchen to serve a separate dwelling unit in the basement.
- b. The subject property is clearly intended for use as a single dwelling unit, despite the size of the structure, as there is a diversity of activities planned for the basement of the structure. The karaoke stage is a unique indicator that the entire basement area is planned for entertaining purposes.

This recommendation is subject to the following condition:

1. This property shall be reviewed by the Zoning Enforcement Inspector sometime within the first six months after the issuance of an Occupancy Permit, to ensure that the accessory kitchen is being used as represented to the Board. If the Zoning Enforcement Inspector finds any reason to suspect that the kitchen is being used otherwise, this case will be brought back before the Board for further review.

Representation – Mr. Lindsey Mosely was present for the appellant, and requested approval. Chairman Stout asked if he understood the recommendation for approval and would agree with the recommended conditions. Mr. Moseley replied in the affirmative.

Discussion – Ms. Meyer asked the staff if there would be any check on whether or not the area for the entertainment would be converted to more bedrooms, with the kitchen staying in place. Mr. Marx replied that this would be fairly easy to inspect over time. They would give the property owner notice of their desire to inspect the property, and some inspections would be done without notice as well. Ms. Meyer asked if they would track this condition for approval. Mr. Marx replied in the affirmative.

Action – A motion was made by Ms. Meyer, seconded by Ms. White and carried unanimously to approve **A-2012-1: QUALITY PLUS HOMES** – an appeal for an administrative review to allow a second kitchen in a single family residence in a Planned Neighborhood Residential (R-3) zone, on property located at 2421 Rossini Place, for the reasons provided by the staff, and subject to the one recommended condition.

- B. **Transcript or Witnesses** - The Chair will announce that any applicant or objector to any appeal before the Board is entitled to have a transcript of the meeting prepared at his expense and to have witnesses sworn.
- C. **Variance Appeals** - As required by KRS 100.243, in the consideration of variance appeals before the granting or denying of any variance the Board must find:

That the granting of the variance will not adversely affect the public health, safety or welfare, will not alter the essential character of the general vicinity, will not cause a hazard or a nuisance to the public, and will not allow an unreasonable circumvention of the requirements of the zoning regulations. In making these findings, the Board shall consider whether:

- (a) The requested variance arises from special circumstances which do not generally apply to land in the general vicinity, or in the same zone;
- (b) The strict application of the provisions of the regulation would deprive the applicant of the reasonable use of the land or would create an unnecessary hardship on the applicant; and
- (c) The circumstances are the result of actions of the applicant taken subsequent to the adoption of the zoning regulation from which relief is sought.

The Board shall deny any request for a variance arising from circumstances that are the result of willful violations of the zoning regulation by the applicant subsequent to the adoption of the zoning regulations from which relief is sought.

1. **V-2011-58: JAMES HICKEY** - appeals for a variance to reduce the required side yard from 3' to 9" for retention of a home addition; and a variance to reduce the required rear yard from 10' to 0' for retention of a deck in a Planned Neighborhood Residential (R-3) zone, on property located at 3606 Windgate Way (Council District 4).

The Staff Recommends: Postponement, for the following reasons:

- a. Because the deck encroaches into the adjoining property to the rear, an additional variance for that property is required to reduce the rear yard to zero feet. The appellant has described such a variance in his request; however, there is no indication in the application materials (such as a letter of permission from that property owner) that he has the right to ask for that variance.
- b. Notification to property owners within a 200-foot radius around that property must be provided if a variance is requested for that property (356 Big Bear Lane), as well as legal notice in the newspaper. A one-month postponement will allow time to provide the necessary letter of permission from the adjoining property owner, as well as notification letters to surrounding property owners, for the variance request.

NOTE: Mr. Griggs announced that he would recuse himself from this case, and he left the meeting at this time.

Representation – Mr. Richard Murphy, attorney for the applicant, was present. Chairman Stout said that the staff had recommended postponement of this application, and asked if the appellant was interested in a postponement. Mr. Murphy said that they would agree to a postponement, but that in October, the Board had continued this case to today's meeting. He said that the objector to the north was not interested in a further continuance of this application. He said that they had a petition from neighbors to the south in agreement with their request.

Objections – Mr. Greg Harris, resident of Windgate Way, was present to object to this request. He said that there had been some good faith negotiations since the first of the year, but that he and Mr. Hickey had been unable to reach an agreement. He said that the variance was unacceptable. He felt that the addition was "right in his backdoor." He said that the bottom line was that the structure's location was unacceptable.

Chairman Stout asked if there was any peaceful resolution possible to this dispute. He said that Mr. Harris and his neighbor should have been able to work this out. Mr. Harris replied that the adjacent addition was up against his property line. He was concerned that Mr. Hickey did not have the ability to maintain his structure. He thought that he would have to bear the brunt of this maintenance.

Mr. Glover asked if his property was on the north side of the structure in question. Mr. Harris replied affirmatively, and that the soffit of the addition actually drained onto his property.

Appellant's presentation – Mr. Murphy submitted a handout of exhibits to the Board, and said that the appellant owned the property adjacent to Mr. Harris. He added that they had offered to mediate their dispute at the Fayette County Mediation Center, but that Mr. Harris did not agree to do so. He said that Mr. Hickey had installed a privacy fence since the October meeting, and that there may also need to be modifications to the soffit, and other changes as well.

Mr. Murphy displayed the site plan on the overhead projector, and said that a survey of the structure indicated that it was 9" off the property line. He said that they requested variances on three sides of their property. He said that there is no longer a need for a variance, as the property owner to the rear had agreed to convey a portion of their property to Mr. Hickey. However, they were still requesting an indefinite postponement of this portion of their request, as the required Consolidation Plat to allow the conveyance can not be completed until the Board acts on the variance now requested. He said that the deck on the south side is less than 3' from the south property line.

Mr. Murphy said that they have petitions from neighbors to the south that are in favor of the proposed variances. They felt that this improvement would add value to the neighborhood. Mr. Murphy said that he would concentrate his presentation on the variance needed on the north side of the property.

Mr. Murphy said that this property is in the Walden Grove subdivision, built 30 years ago by David Walker, a visionary developer that recognized the need for residential development on smaller lots. He referred the Board to page 11 of his handout, and said that the front of the homes had front-facing garages, as there is a drop in elevation to the rear. He said that gardens and flat play areas were not possible on these lots, but they have decks in the rear yards where one could enjoy the trees and the outdoors.

Mr. Murphy said that in 1983, when the subdivision was built, the R-3 zone in the Zoning Ordinance would allow a zero-lot line setback along one of the side lot lines. He said that Mr. Walker did not do so, as they wanted the homes a bit off the lot lines, but everyone knew they were close to their neighbor.

Ms. Moore asked if both side yards were at 0' or just one. Mr. Murphy replied that only one side yard could be at a 0' setback. He said that the Ordinance has since been amended to require a 3' side yard on both sides. He said that there may be an overhang issue in this case.

Mr. Murphy replied that this addition was built more than a year ago over Mr. Hickey's existing deck. He said he had made an erroneous assumption that he could build the addition over the existing deck. He and his friends, not a contractor, built the addition themselves. Mr. Murphy showed several photographs of the addition at this time, from the inside of the addition. He said that the addition was at the same setback as the current addition. The deck allowed for one to look over onto Mr. Harris' property, and this addition is more private than that condition. He said that a window along the property line would need to be removed, as the building code would not allow a window within 9" of a property line.

Mr. Murphy provided photographs from the outside of the property, from the street, and along the property line with Mr. Harris' property. The photos showed both houses, the addition, and the new privacy fence along the property line. Mr. Murphy asked the Board to review page 9 of his handout, and said that the houses, at their closest point, are 7' 10" apart, as they have been since they were constructed in 1983. He said that where the recent addition has been constructed, the spacing is actually 11' 6" in width. He displayed a diagram of this information on the overhead projector.

Mr. Murphy said that Mr. Hickey did not get a building permit, but that there were no complaints about the construction of the addition, and it took a considerable amount of time to construct. However, there was a complaint about a fence that had been partially removed by Mr. Hickey. The Building Inspectors did investigate the site over that issue, and discovered this permitting problem at that time. Mr. Hickey did not realize there was any issue with this addition until after its construction was complete. He said it would have been much easier to rectify had it been caught at the time the foundation was in place, prior to the construction.

Mr. Murphy said that they felt the requested variance was justified for two reasons:

1. The structure is entirely on the appellant's property, and
2. The dwellings are 11½' apart.

Chairman Stout asked if the revisions to the eaves would divert the water away from Mr. Harris' property. Mr. Jim Hickey, appellant, replied that he had installed a gutter on the soffit, but that he installed the privacy fence in an attempt to block the view of his property by Mr. Harris. He said that he hoped the gutter installation would also help his neighbor.

Ms. Moore asked if the addition was entirely on the footprint of the deck. Mr. Hickey replied in the affirmative.

Mr. Murphy said that if he were a nearby neighbor, he would wonder if this addition would hurt the value of their property. He asked the Board to review the petition signed by the neighbors on the street (page 3), which stated that they felt that "the sunroom has added value, as a whole, to the neighborhood." It said that it was so well constructed that "it could only increase" property values. He said that they had included a letter from the adjoining property owner to the rear, Terrace Realty, which gives permission for him to purchase a strip of land.

Mr. Murphy said Mr. Hickey had spoken with Mr. Larry Disney, Director of the Licensing Board for Appraisers in Kentucky, who indicated to him that an addition such as this does not negatively affect property values in a neighborhood. However, they also asked Mr. Ben Campbell to review the impact of the addition. His letter to the appellant was on page 10 of the exhibit handouts. Mr. Murphy read two sentences from the letter which said that the room addition does not diminish the neighboring property owners' property value, marketing potential, or view; rather that it enhances Mr. Hickey's property value, and that of his neighbor.

Mr. Murphy said that, at every point along the property line, the two residences are more than six feet apart. He said that he had included some findings of fact, which summarize his presentation. He said that the layout of the buildings and the topography were special circumstances. He said that it enhances the privacy of the property next door and that it is in keeping with the original concept for the Walden Grove subdivision. He said that, as it was built on the existing deck, it will not impact the property owners' property values in this area, as the addition was a positive improvement to the neighborhood area.

Mr. Murphy said that Mr. Hickey understood that he would still need to make changes to the guttering and to the side wall windows. He admitted that mistakes had been made, but requested approval of this variance by the Board.

Objector's Rebuttal – Mr. Harris said that Mr. Murphy was factual, to a point. He said that the original fence that was along the property line did not block the view of the original deck, so Mr. Hickey installed a corrugated plastic material to create some privacy. He said that Mr. Hickey built the improvements and told him that it had been inspected. He said that last April, he sought a fence permit, which led to the inspections by the government. Until last April, he didn't know he had any recourse, and he didn't know how the existing setback was material to the current need for a variance.

Mr. Stout said that at the last hearing, Mr. Harris' concern was the overhang of the roof drainage onto his property. He asked what the new issue was as of today. Mr. Harris said he was opposed to the construction that had occurred. He thought it had been inspected, and that it had been permitted. Mr. Stout said that the privacy of both properties was intact, and said that this seemed like a property squabble.

Mr. Glover asked Mr. Harris if his objections would have been the same last April as they are today. Mr. Harris replied in the affirmative. He said that in 2005 or 2006, the deck was constructed and it had decreased the privacy between them. He said later on, the property line drainage problems began. He didn't understand that the new construction would be as large as it ended up being. Mr. Glover asked if his objection is that it obstructs his view. Mr. Harris replied that he has two concerns. The first is that there has been a loss of privacy. The second was that the building is virtually on the property line, and it had damaged his yard. He said that there is no gutter on the building, and the drainage problem had continued. If the addition had been properly built, none of this would be going on.

Mr. Glover asked if there were any code violations involved with this addition. Mr. Marx replied that the main violation was with the windows and the structural components of the addition's walls. Mr. Glover asked if they would need to be upgraded. Mr. Marx replied affirmatively.

Ms. Meyer asked if there had been any discussions about screening or plantings that could provide some privacy. Mr. Harris said that Mr. Hickey's property was "a wilderness" but there had been some discussions

between them. He was most concerned about how Mr. Hickey would maintain this addition without coming on to his property. He said that the deck is much higher than the privacy fence and the sloping yard made this very difficult. Ms. Meyer asked if Mr. Harris thought an independent third party could somehow resolve their dispute. Mr. Harris was unsure, and replied that he was not looking for any gain here. He was objecting to the construction being so massive and so close to the property line. He said that it takes his yard to maintain Mr. Hickey's improvement. He asked how Mr. Hickey could be a contractor, yet he didn't know he needed a permit for this construction.

Mr. Stumbo said that he was disappointed that Mr. Hickey and Mr. Harris had not come to an agreement.

Action – A motion was made by Mr. Stumbo to approve **V-2011-58: JAMES HICKEY** – an appeal for a variance to reduce the required side yard from 3' to 9" for retention of a home addition; and a variance to reduce the required rear yard from 10' to 0' for retention of a deck in a Planned Neighborhood Residential (R-3) zone, on property located at 3606 Windgate Way, for the reasons provided by the appellant.

Discussion of the Motion – Ms. Moore asked Ms. Boland if the Board needed to impose the conditions offered by the appellant. Ms. Boland replied that the Board could impose any required conditions, or the record alone could indicate the agreement to conditions. She also said that, due to notice problems, and the agreement to acquire additional property, the Board should not include the rear yard variance in any approval, as that portion of the application was indefinitely postponed.

Mr. Stumbo said he would agree to amend his motion to delete the approval of the required rear yard variance.

Ms. Moore asked if Mr. Murphy could draft the two conditions offered earlier. Mr. Sallee responded that the staff had previously drafted conditions for approval of the variance at the prior meeting. He placed four draft conditions on the overhead, and read them as follows:

1. Guttering shall be installed on the southern wall of the residence within ____' of the property line.
2. The property shall be maintained in accordance with the submitted application and site plan.
3. A consolidation plat shall be filed with the Division of Planning to rectify the deck's encroachment over the rear property line.
4. A note regarding the action of the Board shall be placed on the consolidation plat filed for the subject property.

Mr. Stout asked how condition #1 would be determined. Mr. Sallee replied that these conditions were drafted during the past hearing on this matter, and that based on the new testimony today, the entire second phrase of condition #1 could now be deleted. Condition #1 would read, as amended:

1. Guttering shall be installed on the southern wall of the residence.

Mr. Stout asked Mr. Murphy if a third party could be used to resolve this dispute. Mr. Murphy replied affirmatively, and said that a hydrologist could be employed to resolve this issue.

Mr. Stout asked if the Division of Engineering would be opposed to the third-party hydrologist. Mr. Saylor said they were not opposed, and suggested that the guttering drain to the rear of the Hickey property. Mr. Stout asked if the Building Department would object. Mr. Marx replied that the future maintenance of the Harris property was still an issue for him.

Ms. Meyer said that the third party was an important consideration to her. Mr. Murphy offered an additional condition that an independent engineer with experience in hydrology would be retained and that Mr. Hickey would follow the recommendations about how the runoff was to be treated.

Mr. Harris asked if the cost of this engineer would be split. Mr. Stout replied that the appellant had agreed to cover the entire cost of this professional.

Amendment to Motion – Mr. Stumbo amended his motion to approve the variance with the five conditions shown on the overhead, deleting the rear yard variance from 10' to 0', and for the findings of fact for approval provided by Mr. Murphy.

Action – Ms. White seconded the motion, and it carried unanimously.

D. **Conditional Use Appeals (Continuation of Public Hearing from December 12, 2011)**

1. **C-2011-70: BOONE CREEK ADVENTURES, LLC** - appeals for a conditional use permit to construct and operate an agricultural market and outdoor recreational facility with accessory camping facilities in the Agricultural Rural (A-R) zone, on property located at 8291 & 8385 Old Richmond Road and 8385 Durbin Lane (Council District 12).

The Staff Recommends: Postponement of the agricultural market portion of the conditional use, for the following reason:

- a. An indefinite postponement has been requested by the appellant, which will allow them time to more fully consider the relationship between the agricultural market and outdoor recreational facility, and related issues such as management and timing of construction. The staff is in agreement with this request.

The Staff Recommends: Approval of a conditional use permit for the outdoor recreational facility, for the following reasons:

- a. An outdoor recreational facility of the type proposed should not adversely affect the subject or surrounding properties. All of the activities will be very passive in nature, with very little noise generated and minimal disturbance taking place to the existing topography and ground cover. No significant increase in traffic is anticipated, and most of the improvements and activities will not be visible from Old Richmond Road.
- b. The portion of the subject property close to Old Richmond Road is accessible for emergency response purposes, with a fire station located approximately 2 miles away. Emergency response provisions will be made by the appellant for the less accessible portions of the property, pursuant to an emergency response action plan to be reviewed and approved by the LFUCG Fire Prevention Office. Garbage pick-up and sewage disposal will be handled privately, subject to approval by the Fayette County Health Department.
- c. The subject property is well suited for use as an outdoor recreational facility, given the outstanding scenic values, unique geology, and significant natural and cultural resources of the Boone Creek gorge.

This recommendation of approval is made subject to the following conditions:

1. The recreational facility shall be established in accordance with the submitted application and revised site plan of November 1, 2011, limited to the portion of the subject property located only on the east side of Old Richmond Road.
2. All necessary permits, including a Certificate of Occupancy, shall be obtained from the Division of Building Inspection prior to opening the facility.
3. A parking area with at least 15 but not more than 30 off-street parking spaces shall be provided at the welcome center, designed in accordance with the requirements of the Division of Traffic Engineering, and landscaped as specified by Article 18 of the Zoning Ordinance.
4. An Emergency Response Action Plan shall be implemented as part of the day-to-day operation of the recreational facility. This plan shall be approved by the LFUCG Fire Prevention Office prior to obtaining an occupancy permit. The plan shall include, at the minimum, provisions for handling emergencies in areas of the property not accessible by emergency response vehicles.
5. Each of the 13 lodging shelters shall not exceed 225 square feet in size.
6. Provisions for handling garbage and sewage shall at all times comply with the requirements of the Fayette County Health Department.
7. Suspension bridges over Boone Creek to Clark County shall not be constructed, nor any related activities undertaken in Clark County, until such time that all necessary conditional use permits and other needed approvals are obtained from the Winchester/Clark County Board of Zoning Adjustments or other applicable arm of that local government.

Chair Comments – The Chair asked for those in opposition to stand at this time. Mr. Don Todd, attorney, asked that the record reflect that at last month's meeting, the Chambers were nearly full of objectors. Chairman Stout said that his request would be so noted in the record.

Chairman Stout said that all persons would be limited to three minutes each, and he would ask the staff to time each speaker. He said that he had received several letters over the past month, and he understood the sentiments expressed, both in favor and opposed. He said he did not want the hearing to "get out of hand" and asked everyone to be respectful of all speakers. He also asked the attorneys to limit their comments to rebuttal comments, and final concluding comments.

Mr. Todd asked if the attorneys could briefly discuss the continued hearing procedure with the Chair. Mr. Bruce Simpson, attorney for the appellant, and Mr. Hank Graddy, attorney (in opposition) approached the Chair at this time. Ms. Boland joined in the conversation, as well. Total presentation times of those in favor, and those opposed, were discussed with the Chair.

NOTE: Mr. Griggs returned to the meeting at this time. Mr. Glover and Ms. Meyer left the meeting at this time. Chairman Stout declared a brief recess at 2:09 PM. At 2:14 PM, Chairman Stout resumed the meeting, with all seven members in attendance.

Letters Received & Distributed – Mr. Sallee announced that the staff had received several letters regarding this application in the preceding month, and these letters were circulated to the Board members at this time. Chairman Stout asked the staff if the notice letters sent to area property owners could indicate, in the future, the need for correspondence to be mailed to the staff rather than to the Board members at their residences. Mr. Sallee replied that the staff could add that to the standard notification letter that is mailed for BOA applications. Mr. Glover said that he had received several letters, and he had read them all, but he would not read ones mailed to his residence again.

Objectors (Cont.) – Mr. Todd thanked the Chair, and stated that the objectors would resume their presentation at this time.

Ms. Julie Goodman, 4998 Athens-Boonesboro Road, was present to speak in opposition as a nearby resident. She said that she had lived most of her life in rural Fayette County, and that she was a member of the Boone Creek Neighborhood Association. She opposed the request, as the Board would be legislating, and would be in violation of the Ordinances as they now exist with the Lexington-Fayette Urban County Government.

Ms. Goodman cited Article 7-6(a) and 7-6(a)(2) of the Zoning Ordinance, which speaks to determining the adequacy of public facilities. She said that previous testimony questioned the ability of LFUCG Fire & EMS personnel to adequately serve the property, and the carrying capacity of the existing roads in the area. She said health and safety issues must also be reviewed.

Ms. Goodman said that Article 8-1(d)(6) specifically prohibits amusement parks in the A-R zone. She also cited Article 3-1(f) of the Zoning Ordinance. She said, by negative implication, that the Board must also prohibit a use that is substantially similar to an already prohibited use under the Zoning Ordinance. She said that it was undisputed that an amusement park was already prohibited in the A-R zone.

Ms. Goodman said that if the Board found that this use, or some aspects of it, resembles an amusement park, then Article 3 would require the Board to find that this use was prohibited. She said that the Department of Agriculture sees this use as an amusement park. This is done for safety reasons. The Board, she said, must also review this use in light of public safety. She said the recommended conditions require that this use comply with the restrictions from the Department of Agriculture, yet they only have jurisdiction over amusement parks. She said that if the applicant agrees that they must comply with the regulations of the Department of Agriculture, then they have admitted that their use is for an amusement park. She said that the Department of Agriculture does not have authority to license anything that resembles an amusement park, but rather, only amusement parks.

Ms. Goodman said that Mr. Simpson had already told the Board that their facility is subject to review by that state agency for safety reasons. She asked if was safe to conduct an amusement park in an A-R zone. She said that the documents already submitted into the record by the appellant in their "Waiver and Release" document indicate that a person must certify:

"I further understand that while on the premises of Boone Creek, the activity may be unsupervised for a long period of time, and that contact with third parties by telephone or otherwise, may be difficult or impossible at times. During certain periods, weather may render access to and from Boone Creek treacherous or impossible. I understand, and agree that the weather is unpredictable, and that it is impossible to predict the onset of such conditions."

Ms. Goodman said that 20,000 visitors to Boone Creek would be asked to certify that there may be times that there will be no phone service in the event of an accident, and that roads to the creek would not be accessible. She said that the evidence that has already been submitted, including that provided by the EMT services, that it is unacceptable for an amusement park to be located in an agricultural area. She said that that is the reason

it is listed as a prohibited use in the A-R zone. There are safety reasons and public health issues with such uses.

Ms. Goodman said that she wished to enter some case law into the record, but not discuss it with the Board, in the interest of time. Davis v. John L. Richardson was such a case where a Board of Adjustment approved a similar use, and found that "they did not find any health and safety issues" with such a proposal. It was reversed because there was a need for specific findings for approval, rather than just a generic statement in the Board's findings. Riffin v. Peoples Counsel for Baltimore was nearly an identical case to the facts of the current application, as it involved bungee jumping in a rural area. It was denied because it was found to be a dangerous sport, and one that was not allowed in a rural area.

Ms. Goodman opined that the evidence submitted thus far indicates that safety is a legitimate concern with the proposed use, if the Board were to allow the zip lines and amusement rides. It was also clear that there were health issues associated with this use. The sewage tanks proposed to serve the 20,000 annual visitors would not be sufficient for this property. Since there would be more than 200 gallons of waste produced and under Kentucky Regulations (902 KAR 10-085), the tanks proposed would be insufficient for this conditional use proposal. The government had already determined that the level of waste proposed would be too great for a septic field or tanks or portable toilets. To establish this on a temporary basis, there would have to be a commitment of a full LFUCG sewer line in this vicinity within two years. For that health reason, and for the safety reasons already stated, the requirements of Article 7-1 of the Zoning Ordinance could not be met for this proposed use.

Ms. Goodman said that the Board must not overlook that this is an amusement park use. Also, she asked the Board to consider 446 KAR 060, which requires that all terms must be construed according to their common usage and language. She said that the LFUCG has already established, by precedent, what an amusement park truly is. She said that the Attorney General's Opinion of 1982 (OAG 82-490) established this precedent in granting bonds and revenue to Joyland for certain activities. She added that the industry defines this use as an amusement park and that the ASTM defines this use as an amusement park. She said that the company that has been engaged to construct these facilities defines this as an amusement park. She added that they had already submitted into the record the KRS provisions that permit the Department of Agriculture to regulate this endeavor. She said that a number of other items had also been submitted into the record.

She asked the Board not to deviate from the definitions of the State Department of Agriculture, from those provided by the industry, and by those used by the company that intends to construct these facilities. Based upon the evidence, and upon the documents submitted by the appellant, she said that she could not find any justification for deviating from these definitions. She said that such a finding would be a circumvention of the ordinance as it currently exists. She said that the Board may not legislate, and the Board does not have the ability to locate this use in an agricultural zone. She asked the Board to deny this use for those reasons.

Ms. Carolyn King, a resident of the area at 2470 Grimes Mill Road, spoke in opposition to this appeal. She distributed a petition of opposition to the Board, signed by the owners of 50 properties in the area of this proposal. She displayed a map on the overhead projector of the 2,000 acres controlled by these 50 property owners. She said the area included over four miles of the creek's frontage. The owners in opposition were identified on the map, and some were land owners in Clark County. She said she concentrated on the owners in the immediate area of the proposal. She said that the area land owners were conservation-minded, and wanted to keep the Boone Creek area in its natural state. Her property on Grimes Mill Road had nearly ½ mile of frontage along the creek, and had a conservation easement with the Bluegrass Conservancy. Her property was near other similar easements, as indicated on the submitted map. These land owners wanted to keep the creek free and open to fishing, hikers, and kayaking. Instead, the motives for this application were to profit from the creek. She said that there were many means to make money, but there was only one Boone Creek.

Ms. King said she grew up in Winchester, and had spent much time along Boone Creek. She and the landowners represented in the petition asked the Board to not approve the proposal.

Mr. Hank Graddy, attorney representing the Old Richmond Road Neighborhood Association, spoke in opposition to this appeal. He distributed his written comments to the Board, and said that they included some materials that had already been presented by others. Mr. Graddy said that the Old Richmond Road Neighborhood Association included owners of land in close proximity to this proposed conditional use. He said that the application includes contradictions and contradictory information, including the actual applicant for this permit. He said that there were vague indications as to just how this application would modify the previous

conditional use permit granted for the Boone Creek Anglers private club. That use appears to have become open to the public without any prior approval by the Board. He said that this was documented in a letter to the Board from Mary Dianne Hannah, President of the Old Richmond Road Neighborhood Association (attachment 1 to his letter).

Mr. Graddy asked the Board to deny this application where it seeks to change the land use that is expressly prohibited in the A-R zone. He said that, in addition, the sewage disposal is to be handled in a manner expressly prohibited by the law in Kentucky. He said that because the application is vague, it would be issuing a "blank check" to the applicant to do whatever he wanted to do at this location. He said that the applicant has asked the Board to do what it can not; namely, to not impair the character and the integrity of the zoning district where they are proposed to be located.

Mr. Graddy said that on pages 2 & 3 of his handout, he cited Kentucky cases for the Board which focus on health, safety and general welfare issues. He said that in order to allow a conditional use, KRS 100.237 requires that the Board can only approve specific uses that can be named in the Zoning Ordinance. He said that the most specific use proposed for this site is not listed as a conditional use, but rather, is listed as a prohibited use. He said that pages 3 & 4 of his handout were covered by Ms. Goodman. He said that page 6 requests that the Board disapprove a use that requires the use of a "holding tank" for sewage disposal of more than 200 gallons per day associated with a commercial use. He said that state law was clear that this could not be done.

Mr. Graddy said that the appellant has provided an operational management plan prepared by Sara Smith. Page 4 of that plan stated that "this plan is a living document." That language explains that the plan contains no details or specifics of what exactly, they propose to do here. Mr. Graddy said that on page 12 of the same document, some 6,000-20,000 annual visitors were anticipated for the canopy tour. He said that these numbers do not seem to include children, or others that might choose not to take the canopy tour. In the document, he could only find one sentence that indicated how the sewage from these visitors would be treated. On page 10 of the management plan, under "Protection of Water Resources," he said that the plan states:

"Sanitary waste facilities on the property will be designed as self-contained, and will not be discharged into the environment."

That language describes the use of a holding tank, and one of his attachments to his handout included the state law for their use – KRS 211.970. Portable toilets are included in this section. He said that holding tanks are only permitted for a commercial setting for a use that will generate less than 200 gallons per day. Table 1 of that same document states that the estimated flow is 120 gallons per day per bedroom. For tent or camping design, the regulation specifies 75 gallons per space or platform. For a Visitor's Center, the design is set at 5 gallons per day per visitor. The applicant anticipated about 100 visitors per day to their visitor center – which would yield about 500 gallons per day of sewage. Another 1,000 gallons per day, or more, are anticipated from the camping platforms proposed with this use, based upon the design flow. Mr. Graddy said that this was clearly a commercial use that would exceed the 200-gallon-per-day design standard for the use of holding tanks. The applicant has failed to demonstrate how sewage would be handled for this use; and as such, Mr. Graddy said that the Board must deny this conditional use permit.

Mr. Graddy said that fire safety and emergency responses were also not addressed by the applicant. On page 17 of the management plan, it stated that an emergency action plan would be established. He said that in the year 2000, when the Board approved the Boone Creek Anglers Club conditional use permit, the Board required that an emergency response plan be formulated. However, he said that they had been unable to find any written record of such an emergency response plan for that facility. He felt that the applicant had failed to demonstrate that public safety had been provided for this use.

Mr. Graddy cited Keogh v. Woodford County Board of Adjustments (Exhibit 6), in which the BOA had to decide what a "tourist home" is. In that case, food preparation and safety was a key issue. From their perspective, citing Tab 12 of Mr. Simpson's exhibits, those four pages tell the Board that there is not a legislative prohibition to determining how a use is defined. Since the term "amusement park" is not currently defined in the Zoning Ordinance, Kentucky law was clear that the Board must review how the term is used in other state regulations to see if it has acquired any special meaning, and then to review the common meaning of the word. He said that such a definition has already been provided by a number of people.

Mr. Graddy said that the proposed use would exceed the lodging limitations of the Angler's Club and the open

platforms now proposed. He called attention to the fact that this location is identified on the National Register of Historic Places. This type of activity, including the challenge courses and the zip lines, could not enhance the property in this National Register District. Those would be non-contributing activities.

Mr. Graddy said that he had additional objections to this request in his written materials, but that he would conclude his presentation by tendering Findings of Fact for consideration by the Board. He commented that his findings included references to the Comprehensive Plan, the Rural Land Management area, Core Agricultural Uses, sewage limitations, the 10,000 square-foot limit inherent in the A-R zone, the Boone Creek Conservation Plan, the Greenspace Plan, the National Register nomination, and the Boone Creek Special Protection Area. All of these indicate that this use is incompatible with these plans. He concluded by asking the Board to deny this use in that it was a clear violation of the A-R zoning provisions.

Mr. Todd stated that the opposition had concluded its presentations by witnesses.

Appellant's Rebuttal Remarks – Mr. Bruce Simpson, attorney, was present to represent Mr. Burgess Carey and Boone Creek Adventures. He distributed a packet of information to the Board. Mr. Simpson said that the appellants had submitted their case in chief at the last meeting of the Board in December. He said that he was troubled by a significant portion of the objectors' case.

Objection – Mr. Simpson said, in regard to the introduction of Ms. Goodman as a judge by Mr. Todd and Mr. Graddy, there was an implication that the Board should pay more attention to her than to any other witness. He objected to that, in that he felt it to be improper and inappropriate. He said that Ms. Goodman is a District Judge, not a Circuit Judge, and her testimony should carry no more weight than that of any other attorney or witness. He felt that her repeated reference to being a judge was improper at a quasi-judicial proceeding such as this hearing.

Mr. Simpson said that the Board members have never before been asked to consider what constitutes an amusement park. He said that, prior to this hearing, a description of the uses proposed on the appellants' 167-acre recreational project would not match the Board members' understanding of what constituted an amusement park. He said that the objectors had been orchestrated to describe this project as such a use. He said that, based on the evidence presented, their proposal was not another King's Island, Disney World, or the like. He did not want to debate this with the Board, as at the last hearing, the Board was instructed by their legal counsel that they had to determine if the proposed use was a commercial recreational facility, with the walking trails, the mountain biking, the canoeing, the kayaking, the rock climbing walls, the canopy tour, and those types of activities. Mr. Simpson asked if those uses resemble King's Island or Disney World.

Mr. Simpson said he had prepared a written Memorandum of Law which he tendered at the December BOA meeting. He said that last month, Ms. Gloria Martin provided definitions for amusement parks found on Google and the Internet. Mr. Simpson then provided, at Tab 5, a number of definitions for their use versus an amusement park. He said that the Board must determine whether this use matched the Webster's definition for "a commercially operated park having various devices for entertainment such as a merry-go-round or a roller coaster and usually booths for the sale of food and drink." He asked the Board if they heard any description of their use like Webster's definition of an amusement park.

Mr. Simpson said he entered "amusement park" into a Google search, selected "images," and then received almost 30,000 entries. He entered into the record about 30 of those at Tab 6 of his exhibit—none of which resembled their property.

Mr. Simpson said that, at Tab #7, a number of local uses were listed as "amusement parks" locally according to the internet. He said that Mr. Park had testified last month that, once he became aware of the actual use proposed, he was "on board" with the application. He said that under Tab #8, the results of Mr. Park's Open Records Request from the Department of Agriculture revealed that there were a number of amusement parks regulated in Lexington. Mr. Simpson said that the Department of Agriculture regulates the safety aspect of a number of rides associated with these local businesses. He said the ORR listing included 28 amusement ride companies, including rides at churches, at the University of Kentucky, Chick-Fil-A restaurants, Chuck-E-Cheese, a Shell station in Hamburg, Southland Pool and Shillito Pool operated by the local government.

Mr. Simpson said that less than 1% of the use associated with this 167-acre site (that the area for the zip line) was for an amusement. He said that if the Board felt that their use was a true amusement park, then "this case is over." He felt that such a characterization was an unreasonable conclusion, given the outdoor nature of

their proposal. The ordinary use of the term "amusement park" was nothing like their proposal. He said that the fact that every witness today claimed that it was so, does not make it so.

Mr. Simpson said that the objectors claimed that the site was so remote that no conditional use should be permitted at this location. He said that no empirical evidence had been submitted, and that no other documentation had been offered. He did acknowledge that one citizen last month had spoken with staff members at Fire Station 18. However, he said that there was no credible evidence submitted that there was some sort of deficiency. He said that 55,000 cars per day traverse in this area on Interstate 75. At Tab 9 of his exhibits, Mr. Simpson did provide documentation of the ability of the Division of Fire and Emergency Services to serve this property. He said that Allen Case and Brian Wainscott with the Fire Department provided information to the appellant. Station 18 is two miles away, and he said that the Fire Department would respond to their site in about four minutes. Stations 21, 9 & 16 would have longer to travel, as they are about 11 miles away; but they would be able to respond in 4-8 minutes, depending upon the traffic. He said that Old Richmond Road is classified as a Minor Arterial, and is considered an "improved roadway." He asked the Board to compare this road with Jacks Creek Pike, which serves Raven Run Park. He said that is located 2.7 miles from this location, and has some 32,300 annual visitors, according to the Parks Department, but is much less accessible than their location. He submitted the e-mail from the Parks Department into the record.

Question – Mr. Griggs said that the other fire stations mentioned were about 12 miles from this location, and he asked if they truly could respond in 4-8 minutes. Mr. Simpson said that those were the time estimates he was provided. Mr. Griggs asked if the travel speed in miles per hour had been calculated. Mr. Simpson replied that, in an emergency, they would be responding quickly, and that this was the only documentation that he had seen. Noting that Raven Run had as many visitors as was reported, he said if the Parks Department would knowingly put that many persons at risk. He thought not.

Mr. Simpson said that Mr. Carey estimated that the highest number of visitors each year to this property would be about 20,000. He said that the objections voiced today would be more believable if it involved 20,000 visitors per day. He said that that would equate to about 55-66 people per day visiting this site (365 vs. 300 days of operation per year). He said that he did not consider 66 additional persons per day to result in a huge impact to this area.

Mr. Simpson spoke to the Comprehensive Plan, the Greenspace Plan and other plans that were "red herrings" in his opinion, but he did want to address the sewage issue that had been raised by the objectors. He reminded the Board that they had "no jurisdiction over sewage." He said that sewage treatment would be within the exclusive purview of the Fayette County Health Department. He said that every case of this type is conditioned upon receiving the approval of the Fayette County Health Department, because they have the expertise; must issue all permits; and have to judge the designs for treatment of these wastes. He said that the Planning staff does not expect applicants to bring "four hours worth of information" to Board of Adjustment meetings to address these issues when it is "not the Board's call." All applications to the Health Department are subject to Open Records Requests, and objectors to this use can go to that agency and review their submitted information. He felt that this was not the time to get into that level of detail.

Mr. Simpson said that the same is true of the Emergency Response Plan required for the Fire Department. He said that the Fire Department staff had already visited their site twice to review the access, and the appellant had provided the emergency access locations that they desired. He said that they would also provide, on site, a four-wheel drive vehicle that they recommended. They will also store 10,000 gallons of water on their site, for emergency uses.

Mr. Simpson said that when the Board considers a conditional use permit such as this, it is customary for them to condition their approval upon the approval of other agencies such as the Health Department and the Fire Department. The Division of Engineering would also have to approve their roadways, and their decisions could be challenged "if they were not doing what they are supposed to do" in reviewing those details. He said that this hearing is not such a forum, as such a detailed discussion could take up to two weeks. Instead, he said that the Board must first consider whether this was an application for a commercial recreational use. He opined that their proposed use "including walking trails, mountain biking, rock climbing, canoeing, camping, kayaking, a tree canopy tour and eco-system educational tours" most resembles an outdoor commercial recreational use.

Mr. Simpson said that the Board must also consider whether this use would have an adverse impact upon anyone. He said that the objectors are a bit removed from this site, but they have a great fear that this use will

"do them harm." There is no requirement that an applicant come up with a preliminary assessment of their proposed use; but Mr. Carey had done so, by hiring one of the pre-eminent environmental consulting firms in Kentucky, the Smith Management Group. That group "helped get McConnell Springs going," and they are well respected among municipalities in the state. He said that is why they chose to hire them. He said their report was 200 pages consisting of a preliminary assessment; documented history; an assessment of environmental resources; and management issues for the proposed use.

Mr. Simpson said that Mr. Carey does not want to destroy the centerpiece of the activity that he proposes. Instead, he wanted to show it off, and to educate the public. He said that the reason is because there is nothing like this in Fayette County, and the only similar use is at Raven Run. He said even at Floracliff, a private reservation is necessary to view that property. He said that no one had chosen to make such facilities public, until Mr. Carey, as no one had the passion or the interest in doing so. He said that "opportunities are fleeting," and that the government does not have the resources to restore an 1803 mill, or tackle invasive species in this area. He said that some future purchaser of this land might harvest the timber on this land. He said that our community was fortunate to have someone willing to invest \$2,000,000 in this project, to take care of this land in a responsible way and to make it available to the public.

Mr. Simpson said the most compelling evidence submitted thus far was that the proposed use would not impact the adjoining neighbors to this property. He said that in his career, dating back to 1988, the citizens that were the most upset about a land use application had been the adjoining neighbors, at least until this case. This was true whether the use was a shopping center, a new neighborhood, an apartment complex, or an industrial development. He said that Mr. John Park, an adjacent property owner and the Chairman of the Greenspace Commission, is committed to the environment.

Objection – Mr. Todd rose to object at this time. He stated that Mr. Simpson had already spoken for 24 minutes, and was moving from Rebuttal to Closing Arguments. Chairman Stout said that he would afford Mr. Todd the same amount of time.

Mr. Simpson said that the residents living closest to the site should fear the new use the most; however, Mr. Park does not fear it. He said that Mr. Park also sits on the Board of Directors of Floracliff, and that Mr. Park would never want a nuisance next to his property. He said that Bill Meade and the Ashbrooks also own property to the north of this site. He said that under Tab 14 of his exhibits, the people identified in support of this project own property next to this location. They were all in favor of this. He said the Ashbrooks own 168 acres immediately adjacent to Mr. Carey's land. He read from the Ashbrooks' letter of support into the record, which stated that they own land bounded by the Kentucky River and Boone Creek in Clark County. They commented that since the Anglers' Club opened in 2000, they had not had any adverse impacts, Boone Creek was cleaner, and trespassers and litter problems seemed to be resolved. They felt that this proposal was a viable way to use this land while keeping its integrity. He said that they supported his request for this conditional use permit.

Mr. Simpson said that the people to be most impacted by this proposed use were the ones most in support of it.

Mr. Simpson said that the Health Department had jurisdiction over sewage waste. Still, he asked Ms. Sara Smith to provide rebuttal information to the Board regarding Mr. Graddy's earlier comments. He said that at this early stage, it wasn't known whether there would be marine toilets or some other means of sewage disposal. However, the Health Department would review that information; and if someone were aggrieved with their decision, he said that "they could appeal it." Mr. Simpson asked Ms. Smith to describe to the Board what would happen if nothing is done on this property and it is left in its current state. Also, he asked her to respond briefly to the options for waste treatment that she might recommend to Mr. Carey.

Ms. Smith said that the Health Department is in charge of these issues, but that there was an existing septic field at the top of the hill on the site, near the proposed Welcome Center. She said that it will be enlarged if necessary, and should be adequate to handle the waste from that facility. She asked the Board to keep in mind that Raven Run has human waste facilities at their Welcome Center, and nowhere else in the park. She did not expect there to be any need for human waste facilities along either the hiking or biking trails on the site. She said that there would be a staff member stationed along the creek to watch for trespassers, and there would be a remote waste facility there. It would be more like a "chamber pot" than anything that would produce large volumes. She said that a marine toilet would be a dry disposal system that would be transported out on an all-terrain vehicle. She said that they were not able to contain 200 gallons each. She said that the camping facilities would be similar to that, subject to approval by the Health Department. They would be primarily

supported by the existing septic facilities, and expanded if allowed to do so. She said that she was not a fan of septic facilities in a karst topographic location, but she acknowledged that they are commonly used in our rural areas. She cautioned that they must be done carefully.

Ms. Smith said that if nothing is done with this land, the invasive species would continue to kill off other vegetation. She said that Wintercreeper, a green, low-growing ground cover, kills off flowers in the forest. She said that bush honeysuckle is pervasive and the only way to get rid of it is via physical labor. Herbicide used on that species is too damaging to other vegetation. She said that the property is currently used for cattle, which are causing erosion, and they are invading and impacting the creek. She was not sure what would happen to the historic resources with no one on site.

Mr. Simpson asked Mr. Barry Grimes, a resident of Richmond, KY, to address the Board about his experience with Boone Creek, his experience dealing with invasive species, and his background as an outdoorsman.

Mr. Grimes read a prepared statement into the record. He thanked the Board and said this project was one he supported. He said that he is one of the few persons that had the "legal right to visit Boone Creek." He understood where non-point pollution originated along Boone Creek. He said that traditional agricultural practices such as cattle, fertilizer from crops, and erosion along stream banks were hard to miss upon such visits. He liked the canopy tour idea because it would not add pollution to the creek, nor would people trample the vegetation. He said that canopy tours were allowed in National Parks, and in Costa Rica, where biologists pioneered their use to protect fragile jungle eco-systems. Canopy tours are a means to preserve fragile environments.

Mr. Grimes said he could not understand the opposition of the Fayette Alliance to this use, which heralds sustainability. He thought that such organizations would welcome this use. Instead, he said that they were spreading misinformation and were characterizing it as an amusement park. He said that this canopy tour would preserve the environment along Boone Creek. He said that the honeysuckle and wintercreeper were not able to be combated by every landowner along the creek, since their removal is so labor intensive. Still, Mr. Carey was prepared to do so if this use were permitted. He asked the Board to approve this application.

Mr. Simpson asked Ms. Sarah Carey to describe how they would operate the uses on this property responsibly, and how it would not adversely impact their neighbors. Ms. Carey, a resident of 324 Queensway Drive, said that they don't reside on Richmond Road because they believe that it is a property to be shared, and not just used by their family. She said that visitors often question why they don't live in the Anglers' Club lodge, instead of in the city. She said that residing at the lodge enhanced a feeling of "territorialism" in them that they did not welcome. Instead, she said that she and Mr. Carey made a pact not to live there because they want to share this property with others. She asked the Board to allow them to do so.

Ms. Carey said that Mr. Carey did not purchase the property in 1996 with any premeditated plans. He has taken care of the land since then. She said that his inspiration for this project was, in part, a day spent on the creek with his stepfather, who was fishing for baby brook trout. Mr. Carey caught a picture of Dr. Lovell, who, in his mid-70s, was very happy. That day prompted Mr. Carey to want to share this special land with others, so that they could also enjoy it as well. The Anglers' club was born out of this event. Similarly, an experience by their six-year old daughter also prompted this application. A photo of their daughter at Y-camp in a harness, confident and enjoying the outdoors, begged the question as to why such an experience could not occur at their Boone Creek property. She said that their guests enjoyed time on Boone Creek, and they enjoyed hosting them.

Mr. Simpson said that there had been concerns expressed about the size and square footage of the buildings that would exist on the proposed commercial recreational area. At Tab 10, the building square footage had been provided for the campground, the commercial fish camp (4,570 sq. ft.), and the 1,500 square-foot Welcome Center. The new structures for the Boone Creek Outdoors would be 7,925 square feet, broken down in the statistics for each structure. Thus, they were below the 10,000 square-foot limit for most A-R conditional uses.

Mr. Simpson said that at Tabs 11, 12 & 13 of their exhibits, guiding documents were provided that illustrated compliance with the Comprehensive Plan, even though this request does not involve a zone change. He highlighted several Goals and Objectives of the Plan,

Mr. Simpson said that if Mr. Carey is not allowed to conduct this use, it is unlikely that someone else would

“step up” and be willing to spend the money to deal with invasive species and preserve the land, the “Daniel Boone caves” and the eco-system. He said that this land is special and unique. This application proposes to share this special land as well.

Mr. Simpson said that their proposal promotes policy objectives of the Plan, as well. He said that the Rural Land Management Plan objectives and portions of the 1994 Greenspace Plan, which is still part of the community’s Comprehensive Plan, is also furthered with their application. He provided information from that plan, a portion of which stated “increased tourism and recreation in keeping with increased rural public access opportunities and in balance with the need to preserve the need for security and privacy for farmers and residents.” Increased public recreation, in turn, will build support for the rural greenspace plan.” He said that there is a need for increased educational opportunities for the public. Up to now, this area has been shielded from the public, but now, the Board had an opportunity to open it up for the public.

Mr. Simpson said that the Board had “incredible power” in terms of land use. The Board had the power to allow this land use “to start” and had jurisdiction to monitor it along the way. The Planning Commission and the Urban County Council did not have such authority. He said that if they did not live up to their plans, the Board could revoke their permit, or modify their activity. He said that Mr. Carey was prepared to expend money to live up to their proposal, and the stated goals of the Greenspace Commission. By monitoring this use, the Board could become the chief stewards of this project. He said that this use would truly be a first for Lexington.

Mr. Simpson asked the Board to review Tab 16 of their exhibits. He provided some information about “heritage tourism” from the Greenspace Plan, and said that there is an 1803 mill on the property and the first industrial site in Kentucky, dating from 1820, a black and white photo of which was later displayed on the overhead projector. He said that the entire document mentions the need for “access to the public.” Up to now, the local practice has been preservation for private property owners, and the public has not been allowed access, because no one like Mr. Carey has stepped up to do so. He read additional information about trails and the need for trails in the rural area, along with the need for protections for adjacent farmlands. He said that their management plan does this and that their neighbors agree with this plan, which is why they support this application.

Mr. Simpson said that five focus areas were also identified in the Greenspace Plan 17 years ago, and Boone Creek was one of those areas. He read from pages 32 & 33 of that plan, and said that there should be strategies for their long-term protection. Such strategies “should consider opportunities for increased public recreation in the rural area.” He said that the 4,000-acre Boone Creek area was mentioned specifically on the bottom of page 32, and that there was no intention in the plan for there to be public access “throughout the entire area.” “There would be limited locations for public recreational areas in these sites.” He said that this plan spoke directly to their current application, especially given its location so close to I-75. He said that there was a need to educate children and the public on the need to preserve areas such as this for future generations.

Mr. Simpson asked that the Board give this application a chance. He said that with the level of demonstrated opposition, he recognized that there would be heightened scrutiny for their activities. Mr. Carey was prepared to be open and transparent about their operations, as he was at the numerous meetings with neighbors over the past few months, in an attempt to accommodate their interests.

Mr. Simpson said that opportunities to create such public access to areas don’t come along often; and, in fact, haven’t come along before. He asked Mr. Carey to address the objections that this was “all about the money.” He said that Mr. Carey had a business plan; without one, he would have been criticized for being foolish. Mr. Simpson said that the plan would be successful, and that Mr. Carey would take care of the operation. He said that Mr. Carey was a motivated, interested, and caring owner of something terrific. He asked Mr. Carey to share details with the Board about the business plan, and to rebut the charge that his was a selfish, private pursuit.

Mr. Burgess Carey, appellant, thanked the Board and those present for their interest in this project. He said that he was a developer, experienced in construction, and had an interest in recycling and environmental remediation. As a developer, he was interested in bringing businesses and projects to their fullest potential. His favorite part of being a developer was “turning a negative into a positive.” He said that outdoor recreation was his passion, as he was “a skier, a snowboarder, a mountain biker, a paraglider, a kayaker, a rock climber, a hiker, a mountain climber, a scuba diver, a birder and a general lover of all things outdoors.” He said he was a life-long resident of Lexington, and this project would require him to bring together all his skills, contacts and experience. He felt that this project would be the very best he could offer our community. He said that this

project was 17 years in the making, and that he always desired to bring the “highest and best use” to this property, since he first saw it in the early 1990s. He felt that its highest and best use was not the old gas station at the top of the hill, but, rather, the scenic beauty of the gorge. His mission has been to share it with others. The plan he put together has taken years, been comprehensive, and has been inclusive of his neighbors.

Mr. Carey said that the plan had been diluted in the interest of compromise with those in opposition to it. He said they removed the agricultural market aspect of their proposal, and reduced the amount of overnight accommodations available on the site, due to the input of all stakeholders. He said that meeting the Goals and Objectives of the 2007 Comprehensive Plan was also an important part of his plan. He said that Mr. Simpson had already addressed how that would be done.

Mr. Carey said that he had asked for the city to grant this conditional use permit in the Agricultural Rural zone. He said that now was the time for the city to “step up,” and he asked whether our community would be “one that talks about what it wants, but does nothing.”

Mr. Carey said that eco-tourism, as it has been defined, does not exist in Fayette County. Agri-tourism does exist in the form of the Kentucky Horse Park, local horse farm tours, wineries and a corn maze, but, that recreation demands participation. He said that this facility, inherently rural in nature, demands participation and activity. He said that Lexington had recently been called out as being the laziest city in America. He said that this project can take a step to combat that perception. He said that “we must change.”

Mr. Carey said he could appreciate those who value the rural area and have taken steps to preserve such lands. He added that these steps had not added public exposure and interaction with this valuable resource. Like the fact that museums have become more interactive in order to share artifacts with the public and with future generations, so must land use planners and stakeholders promote interactivity and the enjoyment of rural resources if they want future generations to continue a legacy of conservation and celebration of our community’s natural and cultural resources.

Mr. Carey concluded by providing a statement from the 1992 Kentucky River Basin Study done for the Kentucky River Authority on the overhead projector. Using Boone Creek as an example, he read the following from the bottom of page 2 of that document:

“Increased recreational use of the river corridor will stimulate greater interest as the quality of the river ecosystem. This establishes a self-perpetuating cycle as the resource improves, so does the recreational experience. Through greater use, there will be greater interest in resource protection.”

Questions – Ms. Moore asked if Mr. Carey planned to sell t-shirts. Mr. Carey said that they would be available online. She asked if they would sell food at this location. Mr. Carey replied that they would not. Ms. Moore asked if the camping areas would be lighted at night. Mr. Carey replied negatively, and said that their location was already well lit from the Interstate. Ms. Moore asked if he was aware that an outdoor recreational use would not be permitted to sell merchandise or food, or to have lighting. Mr. Carey responded affirmatively, and that they would also not be permitted to have any loud outdoor music.

At this time, he asked to display a three-minute video of Boone Creek Outdoors. Besides offering several photographs and videos of the site, the narrator described how the combination of environmental protection and eco-tourism would make for a better quality of life. The narrator said that trespassing would be reduced, natural habitats would be protected, invasive species would be removed, jobs would be created, safety would be enhanced, the community would benefit from innovative development, and that tourism would be increased, at a location 15 minutes from Lexington in a National Park-like setting.

NOTE: The Chair declared a recess at 3:56 PM. He reconvened the meeting at 4:02 PM with all members in attendance.

Objector’s Rebuttal – Mr. Todd reviewed those that had entered information the record at the December, 2011 Board of Adjustment meeting. He said that Knox van Nagell introduced a letter from Mr. Todd Clark from the Fayette County Farm Bureau, and that Joan Mayer, a resident of Clark County had testified. Mr. Todd said that Gloria Martin had introduced several statutes applicable to this case dealing with amusement parks. He said that Ann Graf had testified about Navigate, which was a zip line park in North Carolina. He said that Austin Kerr testified about the 10,000 square-foot limit in the A-R zone.

Objection – Mr. Simpson rose to object at this point. He said that Mr. Todd was reviewing his case in chief, and that this had already been presented to the Board. He objected to repeating the same information that had been presented in December. Mr. Simpson said he had no problem with rebuttal at this point, but he did not want to rehear the previous information. Chairman Stout asked Mr. Todd to proceed to rebuttal.

Mr. Todd said that Jim Lerton had testified that the emergency response would be inadequate. Jim Roberts, a veterinarian, had spoken about agri-tourism uses. Linda Carroll had testified about the National Register of Historic Places in this area. He said that there were Memoranda of Law submitted by Ms. Goodman and by legal counsel that he also asked to be entered into the record.

Objectors Closing Remarks – Mr. Todd said that he understood that Mr. Carey had a project that he was convinced was a wonderful activity, he said that it might be, at some point in time. He felt that he was going about it in the wrong way. He said that this particular application is a “spot zoning,” and he did not feel that this application was truly for a conditional use permit.

He said that Mr. Simpson had spent a good deal of time describing the people living closest to this location and the people living in the larger area. He asked the Board to use some common sense. He said that the three or four landowners that live closest to this property will benefit financially from it. He said that the owners of those 2,000 acres shouldn't be placed ahead of the 50 persons that signed the petition in opposition to this request. Their only interest was to preserve, protect and enhance what has been a gorgeous area throughout history. He said that it hasn't changed very much over time, and he didn't see the immediacy of their concern. He said that the Old Richmond Road Neighborhood Association, represented by Mr. Graddy, and the Boone Creek Neighborhood Association, which he represented, were not “sit back and watch television” type of people. He said that they had been involved in these discussions for 30 years, and that they had participated in the formulations of the plans mentioned at today's hearing. He said that those plans were formulated by residents of these two associations. Likewise, their members were active participants in the formulation of the Comprehensive Plan every five years. He and his clients had been members of past Plan Update Committees over the past decades. They drafted and formulated these documents, the Rural Land Management Plan, and the Greenspace Plan. Their work took many months and hundreds of hours. They were not done in one day's time.

Mr. Todd said that this issue will impact the entire county. He said that they had inventoried many historic properties and had even studied soil types to formulate some of these plans in the past. These have since been incorporated into the Comprehensive Plan. This was done in order to conserve the agricultural community and to enhance tourism. Tourism existed long before this proposal, and it is a “huge economic generator” for the county. He asked the Board to think about the individuals that spoke in opposition to this request, and the past efforts they have gone through on the county's behalf.

Mr. Todd said that half of Mr. Simpson's rebuttal comments were that the proposed use was not an amusement park. He said that it is such a use. Mr. Todd provided a citation from KRS Chapter 247, saying that “any mechanized device or combination of devices which carry passengers along, around, over a fixed or restricted course, for the purpose of giving its passengers amusement, pleasure or entertainment” is an amusement ride. He said that Webster's Dictionary defines zip lines as “a series of wires and pulleys over a restricted course at speeds of 45 miles per hour for the express purpose of thrills, chills or excitement.” He said that it “was cut and dried” that those were amusement rides. He said that on these 165 acres, there are proposed three zip lines, or at least two zip lines with the possibility of a third. He said that there would be rock climbing, platforms, and 11 primitive shelters that would be devoid of sanitary sewer facilities.

Mr. Todd said that this involved more than just an eco-tourism opportunity such as Raven Run or Floraciff, as those facilities operate only during the day, and they don't have a cost associated with them, as they accept contributions. He said that “they take only pictures and leave only footprints.” He said that there could not be more contrast between the facilities.

Mr. Todd said that the proposed zip lines are the key to this application. He said that each of the 20,000 visitors would pay \$85. That equates to \$1,200,000 each year; thus, this is to be a commercial venture. Mr. Todd said that one could not have a commercial venture in the rural area, unless the zoning had already been approved for it. He said that the first prohibited use listed in the A-R zone is for an amusement park. This is because of the high traffic of visitors, the need for transportation systems, and police and fire protection. He said that, for those services, this was the worst possible place to locate such a facility.

Mr. Todd stated that the best locations for a facility such as this would be in an industrial zone, and a conditional use permit would be required there as well. He said most other communities in the country permit these uses in industrial zones. In some instances, communities have taken the time to create a "tourism category" in their zoning ordinances. He said that such ordinances have looked globally at such facilities, rather than at just a single site, to assess the regulations and the taxation necessary to provide the needed facilities.

Mr. Todd said that this proposed location was the most remote in the county, yet would require the most services in terms of police and fire protection and improved roads. He asked about the taxes generated from this use to pay for these services, as this property is located in the Rural Services Area. He said that the Urban Services Area concept saves all of the community money, and provides much needed organization, regulation, and order. He said that the results of this concept have been economy, good service, order and consistency. Mr. Todd said that this application would result in none of these.

Mr. Todd said that he was amused with Mr. Simpson's assessment of the emergency response times. He thought those might be the actual time to get to the property entrance on US 25. He asked how long it would take from that point to reach a victim on the site. He asked the Board consider how long it might take responders to get a victim out from the gully.

Mr. Todd said that Ms. Wilson had a good friend asked her if he could walk through the creek. She agreed, but on his walk he fell and broke his ankle. He happened to fall on the Clark County side of the creek. Mr. Todd displayed several photographs on the overhead projector of the response to this emergency. Six men had to hand-carry him from the creek to an all-terrain vehicle. From there they had to drive to the roadway. Mr. Todd estimated that this rescue took about one hour, and said that the response to an injury is not just the travel time to the top of the hill, but the time needed to reach the individual victim. He said that this was a key issue as to the safety of this proposed use, and that this would be a true challenge to emergency responders.

Mr. Todd asked why there would be a need for a release to be signed by visitors to "a campground." He said that this document is displayed on the appellants' webpage, and a copy of the release was distributed to the Board members at this time. Mr. Todd said that a release was necessary because this was to be a dangerous activity. He said that persons would be in vests, on cables, 45' off the ground, and that there would be situations where injuries happen. He asked about overnight campers in primitive huts with marine toilets. He said that in the middle of the night, after a few beers, someone might want to go for a walk by the creek, and might fall and break their ankle. He wondered what response could occur at night. He said that searchlights and radios would be necessary for responders in such an instance. He said the photos he earlier provided were during the day, and he asked the Board to consider how this might be different at night.

Mr. Todd said that while this use might be a good idea, this was the wrong place for it.

Mr. Todd said that the sewer issue is, in fact, under the Board's purview, as the Board can determine whether they are adequate. He said that if there was no issue with the sewer, Mr. Simpson would have had a member of the Health Department present to tell the Board there was no problem, as the appellant has "the burden of proof" in these cases. He said that they had spoken with the staff of the Health Department, which had provided them with the appropriate statutes and regulations that they had earlier cited and entered into the record. He displayed a board exhibit of the regulations which had been entered earlier in the hearing. He said that holding tanks are only permitted for commercial usage when a sewer is proposed within two years. As this was for a commercial recreational venture, this regulation would apply to this proposed use. A facility can also only produce less than 200 gallons of sewage per day. Mr. Todd disputed the appellants' estimates of sewage waste, and said that the guidelines of sewage production were entered by Mr. Graddy (Exhibit 2) from the Health Department. Clearly, using the appellants' projected uses, they would exceed the flow limit of 200 gallons per day for this location. Mr. Todd said that there was no chance that a sewer would ever be provided to this location within two years.

Mr. Todd said that in 2000, certain conditions were agreed to by Mr. Carey for the Anglers' Club conditional use, not all of which had been adhered to since. He said that it started as a private club with memberships, then it grew into a party facility, and then it was listed on their webpage nationally to host corporate outings. Mr. Todd said that Mr. Carey hoped to merge the Anglers' Club conditional use with the canopy tours/zip lines/amusement park use. He said that the agricultural market was another component of their original application, and he questioned the progression of these uses. He wondered if this was the prelude to a rezoning request, and said that "this was a B-6P zone at an interchange." He concluded that this was a zone

change request, and Mr. Carey was "backdoor the system." He said that he might have a nice idea, but that this was the wrong way to go about it.

Mr. Todd asked what the right way would be. He said that the right way would be for the Planning Commission, the Council and the staff to "go back and do their job" as was done before with the Greenspace Plan and the Rural Land Management Plan. He said this was what is done every five years with the Comprehensive Plan. He said that there should be a plan for a tourism zone, which would not consider a single site, but rather, consider the entire community. He said that people living on other roadways throughout the county also had an interest in the Board's decision. He said that if the Board were to "grant a zone change" then others would wonder why they spent years in planning the rural area. He said that this would backdoor 30 years of work with a "spot zone." He asked the Board not to do this, but repeated that there is a right way and a wrong way to do this. He asked the Board not to make a mistake by approving this application. Mr. Todd said that thirty years of work had been spent on developing the Purchase of Development Rights program, farmers markets, the Horse Park, Keeneland and other areas that have been developed to co-exist with their rural neighbors. This provided an economic engine for this community.

Mr. Todd said that they had entered findings of fact that reference all of the community plans approved over the past 30 years. He said that Mr. Simpson did not mention that this area had been recommended as a Natural Area (in the Rural Land Management Plan). As such, it should be preserved due to its shallow soils, steep banks, historical resources, and wonderful tree growth since it is a pristine environment due to the creek and the river. The Comprehensive Plan recommended this "because there is nothing like this in Fayette County." He felt it shouldn't be commercialized with 20,000 people trampling the site and traversing on zip lines, with no sanitary sewer facilities. Mr. Todd said that the appellants were asking the Board to approve a zone change.

Mr. Todd said that the only people that have cattle along the River are the Snyders, which are the owners of one of the subject tracts. Mr. Todd said that it was apparent to him that these weren't rural people that knew about the WHIP program regarding the honeysuckle. He said that is a federal program that supplied funds to cut the honeysuckle and that farmers are utilizing it.

Mr. Todd said that the Board members are representative of the community, and that the members must weigh the economic opportunity proposed for one person to make a significant amount of money. On the other hand, the Board must balance the past efforts of the entire community. He said the entire rural community, through its organizations, had expressed its concerns and was asking the Board to weigh carefully its decision. He said that the entire community felt this decision was far reaching and would impact the entire planning process.

Mr. Todd said that Mr. Carey was a good man, and that their objections were not offered personally. He said that this simply was a great idea at the wrong place. He said that Louisville has their zip lines underground in the quarries.

Mr. Todd thanked the Board for their perseverance, and he said that he was disappointed in Mr. Simpson for his comments about Judge Goodman. Mr. Todd said he referred to her as "judge" out of respect since she was an officer of the court. He said that he wouldn't refer to her by her first name, simply out of respect. He understood that Mr. Simpson did not usually attend District Court.

Mr. Stout asked Mr. Simpson if he had any further comment, noting that these would be his closing remarks.

Appellants' Closing Remarks - After jokingly noting that everyone should be relieved by that, Mr. Simpson said that he would like to make one further comment regarding the comparison of this proposal to an amusement park: "a golf cart is a mechanized device that transports people around a fixed course for pleasure and amusement; hence, all golf carts are amusement parks."

He said that he really didn't believe the Board thought that the applicant was proposing an amusement park, although the opposition was desperately trying to contend that that is a valid description of the proposed facility. He said that he would give no more credibility to that contention by continuing to discuss it, noting that there were three or four attorneys arguing that point.

Mr. Simpson suggested that the Board speak to the Planning staff, as they have no vested interest in the case. The staff's job is (as in every case heard by the Board) to review an application based on their professional expertise and education, and to make a fair and reasoned judgment based on the facts of a given application as it conforms with the law as they understand it to be; and the staff knew this was a controversial case. He

said that his experience in dealing with this staff and those in other jurisdictions in cases like this has historically been that the staff always knows they will make someone angry with their assessment (and subsequent recommendation and/or conditions of approval), and therefore it was critical to "get it right." He said that if he were a member of the Board of Adjustment, Planning Commission, or any other Planning board, he would want to know the staff's recommendation and their reasoning behind it, as they are a neutral party -- public servants who have rendered an opinion after research and collective review of an application, which includes looking at any historical interpretation that may have been made in similar cases. He said that the staff had seen this as a valid conditional use request, which means that, by interpretation, this is not an amusement park, and recommended approval of this application. They consistently put their professional reputation on the line and are subject to public scrutiny and criticism. In fact, an editorial in the Lexington Herald-Leader, as well as several letters from people in opposition to this proposal, were very critical of the recommendation for approval of this use, which was based on unbiased opinion on the part of the staff. Mr. Simpson noted that the staff's recommendation was made subject to several conditions, with which his client agreed, although a couple of minor adjustments to those conditions were suggested. He said the staff was agreeable to those tweaks.

Mr. Simpson said that he was there as an advocate for Mr. Carey, and the other attorneys (Mr. Todd and Mr. Graddy and others) were there as advocates for the opposition in an attempt to defeat Mr. Carey's proposal. He said that the staff, including LFUCG counsel, are not advocates for anyone or anything other than the best interest(s) of the application as it relates to the community and those who live here, as well as how it relates to the decision of the Board, noting again that the staff recommended approval of this request. He said that that should be the most compelling of all the evidence, as the staff is a neutral party -- unbiased and unpaid by either the applicant or the opposition.

Mr. Simpson referred to Mr. Todd's multiple references to the work done on the Greenspace Plan. He said that it had been in "on the books" since 1994. Referencing his handout, he said that he had highlighted twenty-two (22) instances where, in the Comprehensive Plan, the Rural Land Management Plan and the Greenspace Plan, public access is recommended to historic, unique and special areas such as the Boone Creek area. He said that it has been eighteen years since the Greenspace Plan became a Planning document, and there has not been one project yet that has provided public access to any such place or area. He noted that anyone could see the property from Old Richmond Road, but they would not see any of the true beauty of the property, as those that toured it and hiked along the creek had. He said that there is a plan in place that recommends public access, and asked where that public access has been provided and how the public might get the benefit of seeing how incredibly beautiful the Boone Creek gorge is if this is not approved. Mr. Simpson asked if these Plans are designed to preserve vistas and the cultural heritage associated with properties such as this just for the benefit of the few people who own them, noting that taxpayers' money was spent on compiling the Plans. He said that these areas are important and should be preserved and maintained, and the Board now has the opportunity to provide Mr. Carey an opportunity to go forward with a proposal under the watchful eye of the Board. The Board of Adjustment is the law in this case and has the power to give life to a project that will provide access to Boone Creek in a controlled manner. He said the Board could ask Mr. Carey to report back in six months and hold him accountable for what he has done on the property, as well as to determine if he has complied with the conditions recommended by the staff. Undoubtedly, he will face criticism and complaints from the surrounding property owners.

Mr. Simpson said that these opportunities do not come along that often, and this is the first opportunity in years, since the Greenspace Plan was adopted, to open up the property to the public. He said that Mr. Carey wants to do it, and do it right, and is willing to put up the money to do it. He has a business plan that will be successful in order to ensure that the property is successful, while still being protected. In conclusion, Mr. Simpson asked, on behalf of Mr. Carey and his family, that the Board give the public the chance to see the natural beauty of the property, as those who had the opportunity to hike along the creek within a guided tour had.

Board Comments - Chairman Stout thanked Mr. Simpson, noting that this case is unlike any other he had witnessed recently. He said he was pleased to see that there are people in the community who are excited about where they live and what happens in the community around them. He added that he was also excited for those who find themselves in support of things that are not "according to the book."

He said that the Board sits in a position where they have to listen to testimony and understand what the regulations are, and sometimes they have to make decisions not necessarily as the staff has recommended. Sometimes decisions have to be made from the way each member sees the case and views the facts as

presented, which is what must be done in this case. He said that undoubtedly they will make some people happy and some not so happy. He asked for comments/questions from the Board that might be answered by either Mr. Simpson or Mr. Todd.

Mr. Glover thanked Mr. Stout and said that he would like to comment on what had been presented, noting that he had sat through two hearings on this issue. He said that first he would like to say something about the Board, noting that it is a volunteer board and serves without compensation or advocacy. The members volunteer their time, interest and effort in trying to do the right thing. They have no agenda and no "ax to grind."

They have no client to represent other than the community and the people who live there. He said that he had tried, throughout both hearings, to keep an open mind and that he had no preconceived opinion about the testimony heard, noting that he was persuaded by the testimony of one witness until he heard the testimony of the next witness/attorney. He added that he had heard all of the testimony, read all of the mail that had been received concerning this case and had read most of the documents that had been submitted. It was his opinion, based on all of the information presented, that he was listening to concerned and responsible stewards (or potential stewards) of the land who are interested in preserving a unique geological area. He said that, from what he understood, if the Board denied the application, the area would continue to be degraded, it could be clear-cut or strip-mined, and who knew what might happen to it if something else was not done.

On the other hand, if the Board approved the application, Mr. Glover said there was the possibility that a pristine area would be destroyed, and that in itself was worthy of their concern. He noted that everyone had a point of view and a perspective on what the decision would be, and he was not sure if they had to make a "legal" decision. They are a Board of Adjustment, and all they do is approve or deny an application for a conditional use permit. It would be up to lawyers and the court perhaps later to determine if they did the right thing. He said that he had listened to everyone, and he believed that the applicant and the opposition share a common vision and purpose – i.e., to recognize the Boone Creek area as a special area. He said that each one of the Board members takes his/her responsibility seriously and, as Mr. Stout had said, it was likely that they would displease someone with their decision.

Mr. Glover said that he had listened to the testimony and arguments, and was ultimately persuaded that this is a good project, his reason being not because it was his vision for the property or what he would do if he were the landowner; but he took some comfort in the fact that the staff had proposed ten amended conditions to support their recommendation of approval. He read each condition, noting that the Board was not actually making the final decision – i.e., there are other approvals that must be obtained for the project to be implemented (e.g., Health Department, the State of Kentucky, the Kentucky Heritage Council, the LFUCG Divisions of Traffic Engineering and Fire Prevention, and the Winchester/Clark County local government agencies). He noted, in particular, the emergency plan that must be implemented, and said that that should alleviate Mr. Todd's concern about the provision of emergency services. He said that these are no small restrictions being placed on this application, and the Board of Adjustment is certainly not the last stop for the applicant before his project can actually be implemented.

Mr. Glover said that, as he saw the Board's decision, they were simply deciding, with these conditions, whether or not the Boone Creek Adventures application for a conditional use permit to operate a commercial outdoor recreational facility in the Agricultural Rural zone was appropriate. He noted that the area is pristine, unique and special; it is not suitable for farming, timbering, mining or any other such purpose. He said he liked the idea that someone cares enough about it to not only propose a plan for using the area responsibly, but also that the opposition was present to offer their concerns about the dangers that might be associated with possible misuse of the area. It was his opinion that there would be no use of the property without the watchful eye of more than half of the people that are concerned about the area.

Mr. Stout thanked Mr. Glover for his comments, noting that there were other Board members who wished to speak.

Ms. Moore first noted that she felt constrained to follow the law. She said that, looking at the language contained in the Ordinance, it allows a commercial outdoor recreational facility as a conditional use and does not allow an amusement park. She said that she did not believe that an amusement ride is an amusement park, referring to the previous (December) meeting when someone had mentioned that the Louisville Zoo has a zip line. It was her opinion that the Louisville Zoo is not an amusement park. The question in her mind was whether or not to allow the proposed use at this location – not whether or not it was permitted by the Ordinance, as it is a commercial outdoor recreational facility, as proposed. She said that she had been assured that there would be no outdoor lighting, loudspeakers, retail sales of merchandise, restaurant or food

service or the like. Therefore, the question for her was, ultimately, in approving a conditional use permit, the Ordinance states that the Board of Adjustment "shall find that adequate public facilities and services needed for a proposal either are or will soon become available to serve the use ... the Board shall give consideration to the road systems, sewage systems, etc., as well as fire and police protection."

She said that, knowing that the staff had recommended approval of the use, she wanted to know if, in light of the discussion and testimony regarding sewage facilities and holding tanks, the staff still believed that what was proposed satisfies the requirements as stated in the Zoning Ordinance, and that public facilities and services are or will be adequate to serve the proposed use.

In response, Ms. Boland said that the condition addressing approval by the Board of Health specifically notes that they will have to find that the septic system at the welcome center is going to be sufficient, either in its current state or as the result of subsequent upgrades to support its use. She said that their expertise lies in that area, and the condition clearly indicates to the appellant that the use still may not be possible if the facilities for waste disposal are found by the Board of Health to be inadequate. The same goes with respect to any temporary storage type facilities for waste management. She noted that campgrounds are also listed as an outdoor recreational use in the A-R zone, and they use those types of facilities. The Board of Health should have the expertise to determine if it is being carried out in a safe manner. It could be that they would limit the applicant to five sites, rather than what he is requesting, or they may say that the waste management plan is adequate to serve the property with the plan he has presented. The point is, that they will ensure that waste and sewage is handled in a way that addresses public safety, which was the intent of the staff when recommending that condition.

Mr. Emmons added that the staff was in agreement with Ms. Boland's comments and believed that the plan offered by the applicant was adequate. He said that conditions #7 and 8 specifically refer to and depend on the Board of Health for their expertise, as Ms. Boland had indicated.

Board comments (cont'd) - Mr. Stumbo said that he thought this was a very exciting project and that he certainly admired the work that Mr. Carey had done, as well as his sincere effort to establish this commercial outdoor recreational facility. However, he did not believe it appropriate to be approved as a conditional use, but, rather, constituted a major zone change for the area. He referred to Mr. Glover's comment about the Board being a volunteer body, noting that he (Mr. Stumbo) had been a Board member for six years. He repeated Mr. Glover's comment about receiving no compensation; that that the Board members give their time and efforts to the community, and that they do listen to the Planning staff's presentations and recommendations. He noted that they do generally agree with the staff. On the other hand, however, if they agreed with everything the staff recommended, and did not present their own opinions and go by their own convictions, there would be no need for a Board of Adjustment; and an applicant would only need to go to the Planning office and obtain approval for a proposal.

Mr. Stumbo complimented Mr. Simpson and Mr. Carey for presenting an excellent case, but he was afraid that the land use planning process was being extorted in order to get this approved. He said he would like to see the Planning Commission and Council "weigh in" on the proposal, and would like for the staff to work with Mr. Carey and others to establish a much needed park; however, it should be one that doesn't jeopardize the environment, Kentucky wildlife or surrounding farm land. He also said that there should be a resolution of the major issues regarding health and safety that would be associated with such a use in the rural area. It was Mr. Stumbo's opinion that this is an extremely significant and important, precedent-setting case that, if approved, could violate KRS 100, the Comprehensive Plan and other Planning ordinances, as well as the requirements of the A-R zone.

Ms. Meyer noted her agreement with Mr. Stumbo's comments, adding that she was not convinced by the applicant's argument. She said this was a definite "gray area" for her and that she was unable to determine if the proposal was for a commercial recreational facility or an amusement park. She said that, after the previous month's meeting where this was discussed, she went to the dictionary for a definition of "amusement park." It is defined as: "A commercially operated park with various devices for entertainment." She then looked up the word "amuse," a synonym of which is "entertain." Within the definition of "entertain" it states: "Entertain suggests the activity of supplying amusement or diversion by specially prepared or contrived methods."

It was Ms. Meyer's opinion that a zip line is a "contrived method," and she said she found it interesting that there had not been much discussion about that in either side's presentation. The canopy tour was discussed, which she said she finds very appealing, noting that she had been on a canopy tour during a visit to Australia,

and it was wonderful. She said the appellant's case has merit, but it should go through the proper channels, and that a text amendment to the Zoning Ordinance would be in order. She thought that the Board was being asked for a zone change rather than a conditional use permit; and, in good conscience, she was unable to support Mr. Carey's request. She said that it would be very short-sighted for the Board to grant the proposal before them today.

Ms. White expressed her agreement with both Mr. Stumbo's and Ms. Meyer's comments, noting that she thought this to be a zone change as well, and beyond the jurisdiction of the Board.

Mr. Stout thanked the Board members for their comments and said that he has been "in the middle of this" since the hearing in December. He said he thought the idea was wonderful, and whether or not it was something the Board could approve was another issue. It was his opinion that the Board had been roped into hearing the case prior to its going through the proper channels, noting is confusion as to why it had not been submitted for a zone change from the beginning, or why a text amendment was not required prior to its coming before the Board. However, a decision now had to be made, and he said he was still unsure how he would vote, as this was a complex case. Mr. Stout said that that was the most difficult aspect of serving on the Board of Adjustment.

When asked by the Chair if there was further comment from the Board members, there was no response.

Action - A motion was made by Mr. Griggs, seconded by Ms. Meyer and carried 4-3 (Glover, Moore and Stout opposed) to deny **C-2011-70: BOONE CREEK ADVENTURES** - an appeal for a conditional use permit to construct and operate an agricultural market and outdoor recreational facility and accessory camping facilities in the Agricultural Rural (A-R) zone, on property located at 8291 and 8285 Old Richmond Road and 8385 Durbin Lane, based on the findings of fact supplied by the opposition, previously submitted into the record

Votes were as follows: Ayes: Griggs, Meyer, Stumbo and White
 Naves: Glover, Moore and Stout

IV. **BOARD ITEMS** - The Chair announced that any items a Board member wishes to present will be heard at this time.

- a. Election of Officers - At the January meeting each year, the Board shall elect a Chairperson, a Vice-Chairperson, a Secretary and any other officers it deems necessary. Nominations shall be made from the floor, and the candidate receiving the majority vote of the membership in attendance shall be declared elected and shall take office at the close of the meeting. The present officers are: Chair - Louis Stout; Vice-Chair - Kathryn Moore; Secretary - Jim Griggs.

Action – A motion was made by Mr. Stumbo, seconded by Ms. Meyer and carried unanimously to re-elect the current officers for the year 2012. There were no other nominations from the floor.

- B. In the past, the duties of Secretary have been delegated to the Planning Manager or a staff member appointed by the Planning Manager. The Chair requested action on this item.

Action – A motion was made by Ms. Moore, seconded by Ms. Meyer and carried unanimously to delegate the duties of the Secretary to Mr. Sallee, Planning Services Manager.

Mr. Stout then thanked the staff, noting that this was not an easy situation. He also thanked the Board and complimented them for being a Board that "does the right thing at the right time."

- V. **STAFF ITEMS** - The Chair announced that any items a Staff member wishes to present would be heard at this time. There were no such items.
- VI. **NEXT MEETING DATE** - The Chair announced that the next meeting date would be February 24, 2012.
- VII. **ADJOURNMENT** - As there was no further business, the Chair declared the meeting adjourned at 5:05 PM.

Louis Stout, Chair

James Griggs, Secretary